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Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1357

THE AMERICAN OIL COMPANY,

Petitioner,

vs.

GEORGE ARNOTT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MAURICE R. GLOVER
200 East Randolph Drive
Suite 2106
Chicago, Illinois 60601
(312) 856-7938

TIMOTHY J. NIMICK
WOODS, FULLER, SHULTZ & SMITH
310 South First Avenue
Sioux Falls, South Dakota 57102

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, The American Oil Company ("Amoco"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 10, 1979.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals* is reported at 609 F.2d 873 (8th Cir. 1979) and is set forth in the Appendix at 1a. The order denying petitioner's motion for rehearing and suggestions for hearing en banc is set forth in the Appendix at 39a. The judgment of the United States District Court for the District of South Dakota is set forth in the Appendix at 43a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A decision of the Court of Appeals for the Eighth Circuit was entered on October 24, 1979, on the condition that plaintiff Arnott file a remittitur of all damages exceeding $125,000. A timely petition for rehearing and suggestions for rehearing en banc was denied on December 3, 1979. The remittitur was filed and the Court of Appeals entered judgment on December 6, 1979.

* The panel was composed of Judges Heaney, Bright, and Stephenson.

QUESTIONS PRESENTED

I. Whether it was proper for the Panel to engage in speculation to determine the meaning of an ambiguous general jury verdict where there are four different and independent causes of action (three common law, and one federal § 1 Sherman Act).

II. Whether it was proper for the Panel to find that Amoco misrepresented the term of the lease of a service station when that was not an issue presented to or considered by the District Court.

III. Whether it was proper for the District Court to instruct the jury that as a matter of law, a fiduciary relationship existed between defendant-lessor Amoco and plaintiff-lessee Arnott when the law of South Dakota was to the contrary.

IV. Whether it was proper for the Panel and the District Court to ignore the law of South Dakota SDCL 53-3-5, which specifically precludes a person as plaintiff-Arnott who accepts benefits under an agreement from repudiating the accompanying obligation of that agreement.

V. Whether it was proper for the Panel to find that Amoco engaged in price fixing in violation of § 1 of the Sherman Act when there was no proof of a combination, contract or conspiracy.

STATEMENT OF THE CASE

This petition seeks review of an unprecedented decision of the United States Court of Appeals for the Eighth Circuit which permitted the panel to speculate to determine the meaning of an ambiguous general jury verdict.

On May 15, 1974, plaintiff Arnott instituted this action which as amended consisted of seven counts, three of which were voluntarily dismissed, and the case was submitted to the jury on the following four causes of action: (1) Fraud and misrepresentation in that Amoco allegedly made false, fraudulent, and deceitful misrepresentations to Arnott concerning Amoco's promotions, equipment, products, and the profitability of the installation of a car wash; (2) Breach of fiduciary duty in that Amoco allegedly had failed to supply Arnott with sufficient gasoline to enable him to operate economically 24 hours a day, and termination of the lease therefor constituted such breach; (3) Debt owing in that Amoco allegedly owed $395.75 to Arnott for attorney fees; and (4) Federal antitrust alleging that Amoco conspired to fix plaintiff's retail price of gasoline in violation of § 1 of the Sherman Act.

BRIEF STATEMENT OF FACTS

The Original Lease of February 18, 1972

On February 18, 1972, George Arnott (Lessee) and American Oil Company (Lessor) executed a written lease of an interstate service station in Sioux Falls, South Dakota, for a term of one (1) year only commencing February 19, 1972, and expiring on February 18, 1973. There was no provision for renewal. As a rental for such service station, Arnott agreed to pay Amoco ". . . a sum equal to 1.8¢ per gallon on *all* gasoline . . . delivered to said service station for resale." The lease further provided that the station would be operated twenty-four (24) hours a day seven (7) days a week.

The Lease Amendment of June 1, 1972

The parties subsequently entered into a Lease Rider amending such lease effective June 1, 1972. The amendment set forth gasoline gallonage volumes for each month; provided that lessee *Arnott would not have to pay rent on gallons in excess of such amounts* and further provided that the lessee *Arnott would be paid*: (1) *$183.69 each month for operating 24 hours a day*; and (2) a second $183.69 per month for having installed a car wash and to reimburse lessee for the cost of same. Lessee was paid the above amounts.

The New Lease of February 19, 1973

On December 8, 1972, the parties entered into a new lease of the service station effective February 19, 1973, for a one (1) year term only. There was no provision for renewal. The automatic renewal provision was purposely stricken out by the parties. The new lease also provided

that the service station would be operated twenty-four (24) hours a day seven days a week.

The Lease Amendment of June 1, 1973

The new lease was amended by the parties effective June 1, 1973. The amendment provided for a total annual gasoline gallonage volume base for the service station of 565,400 gallons, set forth specific gasoline gallonage volumes for each month, limited lessee's monthly rental payments to such volumes, and provided that lessee would be paid $183.69 each month for operating 24-hours a day.

The Lease Cancellation

Arnott failed to operate the station on a 24-hour basis during the month of July 1973 and until August 6, 1973, when he vacated the station. Amoco's payments to Arnott to stay open 24 hours a day are not in dispute. Arnott admitted to receiving the $183.69 each month pursuant to the Lease Amendments, including payment for the months of July and August 1973 (Tr. 59, 140).

On July 17, 1973, Arnott voluntarily cancelled his lease with Amoco—advising Amoco's sales representative Clinton Bucklin that he was tired of having trouble maintaining good help; tired of the long hours, wanted to spend more time with his family; and that he had another job lined up at the Ben Hur Ford Agency. (Tr. 323-324, 437-440). Arnott on July 16, 1973, had made application for the Ben Hur job (Tr. 470).

In view of such cancellation Amoco on July 26, 1973, advised Arnott *inter alia*, as follows:

> "This letter is to inform you, based on your lease cancellation agreement signed on July 17, 1973,

> that we will be at the service station you lease from us on Monday, August 6th to take possession of the property." (Tr. 100)

Arnott, after he had signed the lease cancellation agreement retained Attorney M. F. Pieplow to represent him (Tr. 165). Attorney Pieplow was at the service station on Monday, August 6th and advised Amoco that closing of the station would be considered involuntary. Amoco, thereafter on August 6th, gave Lessee and his attorney written notice of Amoco's intent to cancel the lease effective September 5, 1973, for failure to maintain a 24-hour operation as required by paragraph 2 of the said lease, unless Lessee cured such default by such date. The notice provided *inter alia*, as follows:

> "You have been violating the conditions of said paragraph 2 in that you have substantially curtailed your hours of operation. Paragraph 9(a) of the lease gives our Company the right to cancel said lease if you fail to perform any of the covenants provided for in paragraph 1 through 8 inclusive; said cancellation to become effective by our giving you thirty (30) days written notice of such cancellation. You may, therefore, consider this letter written notice of our intent to cancel your lease effective September 5, 1973, unless the default above stated is completely remedied and we are notified thereof prior to said date or in lieu thereof, you have made satisfactory arrangements with Mr. Clint Bucklin." (Tr. 163-4).

Instead of curing such default, Arnott made the following counteroffer:

> "Please be advised that Mr. Arnott is ready, willing, and able to perform all lease arrangements, including 24-hour operation, upon the assurance of the American Oil Company that it will supply him with all the gasoline and other petroleum products that he can sell." (Tr. 466-7)

Arnott further waived the thirty (30) day period, i.e., to September 5, he was granted to correct the default, and vacated the station on August 6, 1973.

The Supply of Gasoline*

Arnott at all times had a supply of gasoline in excess of the monthly amount agreed to in the Lease Riders. For the month of July 1973, Arnott agreed to operate the station 24 hours a day on a volume base of 72,900 gallons (Tr. 144). Arnott sold some 79,788 gallons in July 1973 (Tr. 135, 442). The total amount of gasoline delivered to Arnott's station in July 1973 was 96,555 gallons and at the end of July, Arnott had some 33,127 gallons of gasoline on hand (Tr. 428-9).

It is undisputed that on June 13, 1973, the United States government froze the prices (wholesale and retail) of all petroleum products including gasoline and by law, gasoline prices could not be *moved*, up or down. It is further conceded that such price freeze of gasoline was still in effect at the time Arnott's lease was cancelled on August 6, 1973 (Tr. 791).

THE OPINIONS OF THE COURTS BELOW

1. The District Court

On August 28, 1978, the jury trial commenced. At the close of plaintiff's case in chief, Amoco's motion for a directed verdict on all issues was denied. On September 5, 1978, the jury was charged and the case submitted.

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* The Panel's statement on page 8 of its opinion that Arnott ". . . closed the station because it was not profitable to remain open" is a clear misstatement of the facts even when viewed most favorably to plaintiff. Arnott specifically testified that operating the station on a 24-hour basis *was* profitable. See Tr. 135, 144.

The special interrogatories with respect to liability only, were answered by the jury as follows:

"Did you find Defendant American Oil Company liable based on:

			(yes) or (no)
a.	False and fraudulent representations	ANSWER	Yes
b.	Breach of fiduciary duty	ANSWER	Yes
c.	Violation of antitrust laws	ANSWER	Yes
d.	Atty's. fees in State Court Action	ANSWER	Yes

The jury returned a general verdict in favor of Arnott and against Amoco in the *lump sum* amount of $100,000 actual or compensatory damages and $25,000 punitive damages. The lump sum general jury verdict of $100,000 was trebled by the district court to $300,000 plus $25,000 punitive damages and attorney fees in the amount of $7,595.70 and costs of $704.64 for a total amount of $333,300.34. Amoco's motion for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, was denied on January 4, 1979.

2. The Panel

On October 24, 1979, the panel affirmed the district court upon the condition that plaintiff Arnott file a remittitur of all damages exceeding $125,000 plus interest and costs. Arnott filed such remittitur and on December 6, 1979, the panel affirmed the judgment of the district court in the reduced amount of $125,000.

REASONS FOR GRANTING THE WRIT

I.

WHERE A JURY VERDICT IS AMBIGUOUS, IT IS IMPROPER FOR THE PANEL TO ENGAGE IN SPECULATION TO DETERMINE WHAT THE JURY MEANT.

The jury returned a general verdict in favor of Arnott and against Amoco in the lump sum of $100,000 actual or compensatory damages and punitive and exemplary damages of $25,000. The jury further answered special interrogatories with respect to liability only against Amoco:

> "Did you find Defendant American Oil Company liable based on:

		(Yes or No)
a. False and fraudulent representations	ANSWER	Yes
b. Breach of fiduciary duty	ANSWER	Yes
c. Violation of antitrust laws	ANSWER	Yes
d. Atty's. fees in State Court Action	ANSWER	Yes

The District Court trebled the $100,000 actual or compensatory damages in view of the jury's finding of liability under the antitrust laws.

As stated by the panel (App. 28a):

> "It would be purely speculative to assume that the entire general verdict of $100,000 was awarded as damages resulting from violation of the antitrust laws. We are, however, satisfied that the evidence amply supports an award of $100,000 actual and compensatory damages on any of the three counts of (1) false and fraudulent representations, (2) breach of fiduciary duty, and (3) violation of the antitrust laws. We are also persuaded that the jury's award to Arnott and against Amoco of punitive and exemplary damages in the sum of $25,000 is supported by the record."

Four counts, however, were submitted to the jury not three. By no stretch of the imagination can it be said ". . . that the evidence amply supports an award of $100,000 actual and compensatory damages . . ." on such *fourth count*—debt owing for payment of attorney fees. The evidence of the amount of such fees was $393.75.

The record reveals that if Amoco is liable for the attorney fees debt, it is liable for only $393.75, thus presenting a conflict between liability findings and the award of $100,000 damages. As the court stated in *Hatfield v. Seaboard Airline Railroad*, 396 F.2d 721, 724 (5th Cir. 1968):

> "Such a conflict cannot be resolved by an appellate court assuming that the liability issues were answered correctly and that only the damage issue was incorrectly decided. Substantial justice and each party's right to a jury trial requires a new trial of all the issues."

In any event, it is not whether the evidence can support any such counts, but whether the general verdict requires the court to engage in speculation to determine its meaning.

It cannot be determined whether the verdict regarding damages relates to: A. Just one cause of action only of the four, and then which one of the four; or B. Just two (2) causes of action only of the four, and then which two (2) of the four; or C. Just three (3) causes of action only of the four, and then which three (3) of the four; or D. To all four (4) causes of action and if so

whether such damages were to be divided equally or unequally between the (1) fraud, (2) breach of fiduciary duty, (3) nonpayment of attorney fees, and (4) antitrust causes of action. (This division problem also applies to B and C.) This problem, contrary to the panel's opinion, was not restricted only to the actual damages of $100,000, but also exists as to the punitive and exemplary damages of $25,000. A judgment cannot be entered upon such a verdict when the jury's intention is unclear and ambiguous.

A. The Panel's Decision Conflicts With Decisions Of The Court Of Appeals For The Third And Fifth Circuits.

As the court stated in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3rd Cir. 1974), *cert. denied*, 419 U.S. 868 (1974):

> "We note that we cannot be certain of how much of the lump sum damages stated by the jury in answer to Question 9 was intended to be allocated to the price-fixing claim. We are not bound by the district court's attribution of $34,200.00 in damages to the price-fixing claim (n. 32 at p. 592).
>
> . . . [W]e cannot be sure whether the jury's affirmative answer to Question 6, finding a "contract, combination or conspiracy . . . which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level," was based on this price-fixing claim or on the claim arising out of the operation of company-owned outlets described above. For this reason, a new trial is required on this claim (*Id.* at p. 591).

As the court held in *Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 694 (5th Cir. 1966), *cert. denied*, 385 U.S. 1004 (1967):

> "Where the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial."

The cases relied upon by the panel are completely inapposite. The issue here is not of waiver or failure to object, but of the panel's and the district court's resort to speculation to determine what the jury meant. The panel partially recognizes this when it states (App. 28a) that "It would be purely speculative to assume that the entire general verdict amount of $100,000 was awarded as damages resulting from violation of the antitrust laws." However, it was just as speculative for the panel to thereafter assume that *any* amount of the general verdict of $100,000 was awarded as damages resulting from violation of the antitrust laws. The jury could have awarded the entire amount for the fourth cause of action—nonpayment of debt owing for attorney fees.

II.

IT WAS IMPROPER FOR THE DISTRICT COURT TO INSTRUCT THE JURY THAT AS A MATTER OF LAW A FIDUCIARY RELATIONSHIP EXISTED BETWEEN LESSOR-AMOCO AND LESSEE-ARNOTT WHEN THE LAW OF SOUTH DAKOTA WAS TO THE CONTRARY.

The district court's instruction that as a matter of law a fidiciary relationship existed between defendant Amoco and plaintiff Arnott was erroneous, highly prejudicial, and a misstatement of the law of South Dakota.* No court has ever before held that a fiduciary relationship exists in a situation such as this.

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* The Court's instruction was as follows:

"You are instructed that a fiduciary relationship existed between the Defendant and the Plaintiff. A fiduciary

(Footnote continued on following page)

As Judge Bright of the panel states in his dissenting opinion (App. 29a):

> "These strictures, though appropriate in the case of a trustee, should not be applied to a commercial lessor. Rather, the lessor should be held to the rules governing contracts in general. It is true that a franchisor might have other duties. But only if the evidence shows a relationship between lessor and lessee extending significantly into other areas is it necessary or desirable to characterize their arrangement as a franchise. Even then one must determine which of the full gamut of fiduciary responsibilities should be required of the franchisor. See *Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co.*, 316 F. Supp. 435, 455 (E. D. Mo. 1970). In my view both the district court and the majority erred in deciding this matter; in fact, South Dakota law does not justify the conclusion they reach."

* * *

> "The parties in this case entered into a business relationship, not a fiduciary relationship . . . . I believe the court committed error when, on the facts of this case, it instructed the jury that a strict fiduciary relationship existed between Arnott and Amoco."

Arnott's claim for breach of fiduciary duty is that Amoco did not supply him with a sufficient quantity of

Footnote Continued

relationship is one founded on trust or confidence placed by one person in the integrity and fidelity of another person. Out of such a relation, the law requires that neither party exert undue influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or to prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of the other person involved."

gasoline to enable him to operate economically 24 hours a day in compliance with the lease.*

There was no requirement that Arnott buy any gasoline from Lessor and there was no agreement that Lessor-Amoco would supply any gasoline to such station. In the original lease Arnott had agreed to pay 1.8 cents per gallon as rent for such property on all gasoline sold. The Lease Riders amending such lease however, set forth gasoline gallonage volumes for each month and provided that Lessee-Arnott would not have to pay rent on gallons in excess of such amounts. Also, contrary to the original lease, the lease amendment provided that Arnott *would be paid $183.69 each month* by the lessor for operating 24 hours a day.

Arnott testified that he had enough gasoline to maintain a 24-hour operation and that he operated 24 hours a day for all such prior months including April 1972 when he sold 53,495 gallons of gasoline; December 1972 when he sold 39,457 gallons; April 1973 when he sold 48,743 gallons; and June 1973 when he sold 76,607 gallons (Exhibit I). The record evidence conclusively establishes and it is not controverted that Arnott agreed to operate 24 hours a day for July 1973 on a volume base of 72,900

* Arnott's claim is set forth in paragraphs XII & XIII of his Amended Complaint as follows:

> XII. That Defendant agreed, as an implied condition of the lease, to supply Plaintiff with sufficient quantities of gasoline and petroleum products to enable him to economically maintain a 24-hour operation . . .
>
> XIII. That Defendant's actions and conduct in terminating Plaintiff's lease for failure to maintain 24-hour operations, while at the same time failing to provide Plaintiff with sufficient gasoline and petroleum products to enable him to economically maintain those hours of operation constituted a breach of fiduciary duty . . .

gallons; that he sold 79,788 gallons in July 1973; that he never ran out of gasoline; and that he had some 33,127 gallons of gasoline on hand at the end of July (Exhibit H).

Q. Would you read paragraph 4.

The Court: This is paragraph 4 of what?

Mr. Nimick: Of the Lease Rider Agreement to the lease.

Q. Just read it, Mr. Arnott.

A. It says: (Reading) The Lessee agrees that the monthly rental refund calculated as per paragraph 1 above shall be subject to a minimum of $183.69 as it pertains to each full calendar month, during the original term of this lease or any renewals thereof, in which the Lessee keeps the premises open 24 hours.

Q. And you in fact did receive those payments?

A. Yes. (Tr. 135).

Q. But yet in your lease rider agreement dated in April of 1973, you agreed to maintain 24-hour operation based upon the gallonage provided in that rider?

A. Yes. (Tr. 167).

Q. Mr. Arnott, this is the lease rider agreement you have signed. Now, will you tell the jury what you have agreed to for June and July of 1973 in that?

Q. Tell the jury.

A. The gallonage for June of '73 as per the lease is 72,500; July of '73, it would be 72,000. (Tr. 168-169).

Q. And you agreed to open it 24 hours for 72,900 gallons?

A. Yes. (Tr. 170).

Q. According to the records, Mr. Arnott, in June of 1972, you sold 64,461 gallons of gas, and in June of 1973, you sold 76,607 gallons. Were both of those months profitable for you?

A. Yes, they were.

Q. The month of July of 1973, according to the records, you sold some 79,788 gallons of gas; was that a profitable month?

A. Yes, it would have been. (Tr. 135).

Q. And that is the month that you determined to close your station?

A. That would have been the month that I determined to discontinue 24-hour operation.

Q. But yet the year before in June, with 64,461 gallons, you found it profitable to be open 24 hours a day?

A. Yes, I did.

Q. The same was true in December of 1972, when you sold 39,457 gallons?

A. Yes.

Q. Now, for the year 1972—or actually it would be eleven and a half months, I guess, or ten and a half months, according to the records, you sold 659,-250 gallons; you found that to be profitable?

A. Yes.

Q. On a 24-hour basis?

A. Yes.

Q. For the period of time you were in the station in 1973, you sold 515,301 gallons, and you found that not to be profitable?

A. No, I didn't find it to be profitable.

Q. On a 24-hour basis?

A. What?

Q. On a 24-hour basis?

A. No; it was profitable. (Tr. 136-137).

Q. In any event, Mr. Arnott, you did agree to stay open if you were provided the gallonage set forth in the rider dated April of 1973?

A. Yes, I did. (Tr. 144).

Arnott does not contest the fact that he accepted the benefits of the transaction pursuant to the lease amendments: (1) he paid rent not on *all* gasoline delivered to the station as the original lease required, but only on a set limited amount of such gasoline per

month and no rent on gallonage in excess thereof, and (2) *he was paid $183.69 each month* to operate the station 24 hours a day as opposed to the original lease that required 24-hour operation with *no* payment therefor.

The panel majority and the district court refused to apply the law of South Dakota, SDCL* 53-3-5, which specifically provides that Arnott is bound by all lease provisions including the one-year term and the 24-hour obligation by voluntary acceptance of the benefits thereunder. (App. 53a)

The holding by the South Dakota Supreme Court in *Schutterle v. Schutterle*, 260 N.W.2d 341, 350 (S.D. 1977) comprehensively covers the factual situation presented in the present case. In *Schutterle* the court stated:

> "Whatever doubts one might have concerning appellant's understanding of the legal effect of the terms of the agreement or her knowledge of the nature and extent of Ralph's property on the date the agreement was signed, then certainly by insisting in April of 1971 that Ralph had no interest in her Iowa farmland and in signing the real estate sales contract containing the above-quoted provisions, and by accepting the proceeds of the sale of the Iowa real estate, appellant ratified the terms of the agreement and will not now be heard to attack it."

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting."

In *Strom v. Buholz*, 73 S.D. 583, 46 N.W.2d 912, this court stated that:

"This statute [SDCL 53-3-5] is a declaration of the equity rule which prevents the party benefitted

* SDCL refers to South Dakota Compiled Laws.

from questioning the validity and effectiveness of a matter of transaction insofar as it imposes a liability or obligation upon him. It precludes one who accepts the benefit from repudiating the accompanying obligations. The rule in effect denies the right to assume inconsistent positions and is based on the principle of election and ratification, . . ." 73 S.D. at 586, 46 N.W.2d at 914.

In *Henrich v. Newell*, 59 S.D. 372, 240 N.W. 327, the court held that the principles of equity and fair dealing would estop heirs who had received benefits of a postmortem family agreement from later challenging the validity of the agreement, citing the following language from *Dobbs v. Elevator Co.*, 25 S.D. 177, 182, 126 N.W. 250, 252:

> "It seems to be generally held that, where one having the right to accept or reject the transaction takes and retains the benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith. Thus, it has been repeatedly held that a person by the acceptance of benefits may be estopped from questioning the existence or validity of a contract."

> "Appellant's conduct in accepting the benefits of the . . . agreement . . . she having knowledge of the facts . . . brings her squarely within this rule." 260 N.W.2d 350.

After deliberating for some two hours and five minutes the jury requested the court to: "Define fiduciary duty" (Tr. 834). The court, without giving any other instructions, again instructed the jury that a fiduciary relationship existed between the defendant and the plaintiff as a matter of law (Tr. 835), and stated in regards to defendant's objection (Tr. 834) as follows:

> The Court: The objection is overruled. I might also add for the record that the instruction is taken from the case of *Mobil Oil Corporation v. Rubenfeld*,

339 N.Y.S.2d 623, a 1972 New York State Court Appellate case (Tr. 837).

As Judge Bright stated:

> "This error was not made harmless by the context in which it occurred, as the majority suggests. *Ante*, slip op. at 19. The disputed instruction was repeated by the court without benefit of context when, after two hours of deliberations, the jury returned with the question, 'Define fiduciary duty.' (App. 31a, note 4).

The opinion cited by the district court as authority for such instruction was reversed on appeal, *Mobil Oil Corp. v. Rubenfeld*, 72 Misc.2d 392, 339 N.Y.S.2d 623, *rev.* 370 N.Y.S.2d 943 (1975). The court in *Rubenfeld* held that a fiduciary relationship did not exist between Mobil Oil Co., lessor of a gasoline service station and the lessee thereof—Rubenfeld.

The reasoning of the court in *Rubenfeld*, 370 N.Y.S.2d 943, is equally applicable to the case at bar, the court stating therein as follows at page 945:

> "The question before us is whether a tenant under a lease of commercial property—a gasoline service station—may defeat the landlord seeking possession of the premises at the end of the term, by asserting a retaliatory defense that the landlord failed to renew the lease because the tenant resisted the landlord's actions in enforcing tie-in and price fixing agreements in violation of the antitrust laws. The civil court held that the retaliatory defense was valid and dismissed [Mobil's] petition (72 Misc.2d 962, 339 N.Y.S.2d 623); that judgment was affirmed by the Appellate term by a divided court (77 Misc. 2d 962, 357 N.Y.S.2d 589). We reverse and grant judgment in favor of the petitioner [Mobil]. A retaliatory defense based upon such circumstances does not result in a continuing obligation on the

> landlord to remain in a contractual relationship with the tenant."

The court further stated on pages 946-947 that:

> "The rights arising out of real property law have ancient bases; any change in these rights is customarily achieved by legislative or constitutional enactment. Under ordinary circumstances, a landlord is not obligated to renew a lease [citations omitted] even though the tenant may have invested capital and energy in the expectation of renewal. Nor in the absence of statute may one contracting party be compelled to deal with the other beyond the contract term. [citations omitted] . . . Hence, it must be concluded that the termination of leases and franchises, . . . is to be judged in the light of the traditional principles of real property and contract law.
>
> . . . though the law sometimes extracts relationships not intended by the parties [cite omitted] and though, as Judge Kassoff pointed out in his opinion, a commentator argues that a fiduciary relationship should exist in franchising agreements (*Mobil Oil Corp. v. Rubenfeld*, 72 Misc. 2d 392, 400, 339 N.Y.S.2d 623, 632). New York has not adopted that concept."

Contrary to the majority of the panel, *Shell Oil Co. v. Marinello*, 120 N. J. Super. 357, 294 A.2d 253 (1972) 307 A.2d 598 (1973), does not support Arnott's claim that a fiduciary relationship existed under South Dakota law. In any event New Jersey law does not control the law to be applied in the case at bar, that of South Dakota. The facts in *Shell v. Marinello*, were completely different from those in the instant case. In *Marinello*, there were two (2) agreements, a Lease and a separate Dealer Agreement. The separate Dealer Agreement provided that the dealer would purchase gasoline solely from Shell and granted a license to use its trademarks in the

operation of the dealership. In the case at bar there was no dealer agreement; there was only the lease of real property.

Marinello further sued for reformation and made no claim that a fiduciary relationship existed and the court made no reference to such. *Nowhere in the court's opinion (trial or supreme) does the word fiduciary even appear.* The *Marinello* court merely held that Shell could not terminate a lifetime lease and a separate dealer agreement without cause. As the *Marinello* trial court stated:

> "The question here is whether or not . . . Shell can, without cause or justification, terminate the relationship and evict defendant from this station." 294 A.2d 261.

Courts of other states that have considered the rationale of *Marinello* have unanimously rejected it. See *Texaco Inc. v. A. A. Gold, Inc., et al.*, 357 N.Y.S.2d 951 (1974) *aff'd* 358 N.Y.S.2d 973 (1974) where the court held that a separate dealer agreement and a lease of a service station did not establish a franchise relationship or the rights and obligations of a franchisor and franchisee attendant thereto. The court held the lease was cancellable pursuant to its terms.

In *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400, 410 (W.D.Pa. 1974) *aff'd* 511 F.2d 1393 (3rd Cir. 1975), the court stated at page 410:

> "The plaintiff has cited one case from New Jersey involving an independent gasoline dealer operating under a franchise agreement with a separate written agreement for the lease of the station premises. *A termination of the franchise agreement and a cancellation of the lease* was resisted by the operator on the grounds that the reasons given by the oil company did not constitute good cause in

> that the grounds given did not demonstrate the failure of the dealer to substantially comply with his obligation under the lease and dealer agreement. Involved in *Shell Oil Co. v. Marinello* . . . was the statutory policy of the state of New Jersey expressed in its Franchise Practices Act. Under that statute good cause was a requirement for any cancellation of a franchise. *The existence of a lease coterminous with the franchise* was an added element in that case. There is no similar provision in Pennsylvania whose law controls the interpretation of the present contract and under the Pennsylvania Uniform Commercial Code, Sec. 2-309(2), in the absence of any controlling contractual provision, agreements calling for successive performance may be terminated by either party without cause." (Emphasis added).

As the court stated in *Whims Applicance Service v. General Motors Corp.*, 1978-1 Trade Cases ¶ 62093 (N.D. Ohio 1978) at pages 74790, 74791:

> "Plaintiff argues . . . upon the authority of *Shell Oil Co. v. Marinello* . . . this argument must be considered under the law of Ohio.
>
> * * *
>
> The plaintiff has cited neither cases decided under Ohio law nor enactments of the Ohio Legislature that indicate any Ohio common law requirement that a good-cause-for-termination provision be appended to a dealer agreement which has expired through the elapse of the contract period. The courts of other states that have considered the rationale of *Marinello* have unanimously rejected it. This court holds that the courts of the state of Ohio would also reject the reasoning of *Marinello.* Accordingly the plaintiffs fail to state a cause of action under the common law of Ohio."

Failure to maintain a 24-hour operation even under the *Marinello* court would constitute good cause to ter-

minate Arnott's lease. The *Marinello* court stating in that regard that:

> "As to hours of operation, Shell should have the right to direct a change in hours in any lease renewal, including a demand for 24-hour operation of the station . . . 294 A.2d 264.

The *Marinello* court further went on to state that Shell had waived the 24-hour requirement:

> "At the end of January and twice in March 1970 Shell did send letters to Marinello informing him that he was in violation of this provision of the lease. Shell acknowledges that after these letters were sent, the Newark district office received complaints from borough officials, as well as at least one neighbor, about a 24-hour operation at this location, and that Shell no longer insisted upon adherence to this provision of the lease, but permitted Marinello to revert to the hours that he had maintained under the prior lease." 294 A.2d 265

In a footnote, the *Marinello* court stated:

> . . . Shell had never complained that it [failure to operate 24 hours] was a violation. . . . in any event Shell never gave Marinello written notice of a default under the lease by reason thereof. Shell terminated the lease by giving written notice of nonrenewal upon its anniversary date, the lease providing for automatic annual renewal unless written notice to the contrary. 294 A.2d 265 (fn)

There is no question that failure to maintain 24-hour operation constituted good cause to terminate the lease. See *Gordon v. Crown Central Petroleum Corp.*, 423 F. Supp. 58 (D.C. Ga. 1976), *aff'd* 564 F.2d 413 (5th Cir. 1977), where the court stated at pages 61, 62:

> The Court is unable to agree that the 24-hour requirement constitutes an anti-competitive practice. . . . The regulation in question serves the public convenience and provides a competitive stimulus; it is not illegal under the antitrust laws.
>
> * * *
>
> Further, the 24-hour requirement does not violate the rule of reason;
>
> * * *
>
> The plaintiff's final argument is that the dealer agreement in question is unconscionable . . . .
>
> The Court cannot find that the contract in the case *sub judice* was an unconscionable contract or a contract of adhesion.
>
> Accordingly, the Court finds for the defendant on all issues. Termination of the plaintiff's Agreement does not violate the Georgia Gasoline Marketing Practices Act, the 24-hour clause does not violate the Sherman Act, and the Agreement in question is not an unconscionable contract.

A. It Was Error For The District Court And For The Panel Not To Apply The Law Of The State Of South Dakota. The South Dakota Franchise Act Excluded Service Stations From Its Provisions.

In its effort to support the trial court's erroneous position that as a matter of law a fiduciary relationship existed between Amoco and Arnott, the panel majority in contravention of the Erie Doctrine and the Rules of Decision Act, relies upon cases from the states of New Jersey, Pennsylvania, Utah, and West Virginia. An examination of those cases reveals that in no way do they support the panel majority's position: (1) *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. 1972), *aff'd* 307 A.2d 598 (N.J. 1973) (where is provision for automatic renewal unless notify in writing of nonrenewal—court held cannot cancel except for good cause); (2) *Amerada Hess Corp. v. Quinn*, 362 A.2d 1258 (N.J. Super. 1976) relationship can be terminated for good cause the court stating at page 1258:

"to deny Hess the right to terminate here would . . . pervert the spirit of the "good cause" requirement and allow defendant to flagrantly flaunt his disregard for the law, his private contracts, and the public interest. Such an absurd result cannot be deemed to have been contemplated or intended by the legislature."

(3) *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (Pa. 1976) (franchise relationship not terminable upon expiration of term, but for good cause only failure to keep station clean constituted good cause); (4) *Seegmiller v. Western Men Inc.*, 437 P.2d 892 (Utah 1968) (plaintiff's failure to discharge his duties as required by contract justified cancellation); (5) *Ashland Oil Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976) neither word *"franchise"* nor *"fiduciary"* is mentioned, court held transaction governed by the West Virginia Uniform Commercial Code and stated as follows at page 440:

"Having determined in this case that the lease agreement and the dealer contract should be construed together and considered to be one transaction, it is clear that what is involved is a transaction in goods (petroleum products) which is governed by the Uniform Commercial Code-Sales. See W. Va. Code 46-2-102 and 46-2-105. In cases such as this, the rules by which transactions should be governed are generally stated in the Uniform Commercial Code-Sales, and within that framework, we believe that defenses may be made and proof may be offered in a manner sufficient to protect the commercial rights of all parties whether they be economically strong or weak."

The other cases cited by the panel majority from the states of Michigan and Louisiana, *Saad v. Shell Oil Co.*, 460 F. Supp. 114 (E.D. Mich. 1978) and *Frisard v. Texaco, Inc.*, 460 F. Supp. 1094 (E.D. La. 1978) are inapposite in that they dealt with the application of the

Federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, which was enacted on June 19, 1978. That act was not in effect during the period at issue in the case at bar.

None of the cases cited by the panel majority held that as a matter of law, a fiduciary relationship exists between a lessor and a lessee or between a franchisor and a franchisee. None of the cases cited by the panel majority even mention or refer to the word *"fiduciary."*

However, there was not even a franchisor-franchisee relationship in the case at bar. In an attempt to establish such a relationship the panel majority refers to the South Dakota Franchise Act, S.D. Compiled Laws, ch. 37-5A enacted in 1974, after the issues in this case had arisen. The panel majority's statement (App. 16a) that:

"South Dakota law therefore indicates that the franchisor and franchisee of a service station operation are involved in a fiduciary relationship . . ."

is a complete misstatement of the law of South Dakota.* Service station operations were purposely excluded from the application of the South Dakota Franchise Act. The legislature of the State of South Dakota in considering

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* As Judge Bright stated in his dissent (App. 30a):

The South Dakota franchise law contains detailed registration and public disclosure provisions akin to those found in the Securities Act of 1933, . . . This scheme of franchise regulation doubtless represents a substantial departure from the common law of South Dakota. But even if the franchise statute reflected existing common law standards applicable to the lease challenged here, the district court's instructions would remain unjustified. The statute merely enjoins unfair or inequitable practices. S.D. Compiled Laws Ann. §§ 37-5A-51 and 37-5A-66(7). It does not establish a fiduciary relationship between franchisor and franchisee or impose a standard of utmost good faith.

the proposed South Dakota Franchise Act designated as Senate Bill No. 210, amended such bill to delete therefrom service stations, i.e., the marketing of motor vehicle fuel.

When the proposed South Dakota Franchise Act was introduced Senate Bill No. 210 in 1974 in the Forty-Ninth Session, of the South Dakota Legislative Assembly* it contained the following paragraph consisting of lines numbered 13-20 which specifically included station operations:

> ** [13]"Franchise does not include any business which is operated under [14] a lease on the premises of the lessor as long as such business [15] is incidental to the business conducted by the lessor on such [16] premises, including, without limitation, leased departments [17] and concession. *Notwithstanding anything in this Act to*[18] *the contrary, franchise shall include a contract, lease or* [19] *other agreement whereby the franchisee is granted the right* [20] *to market motor vehicles or motor vehicle fuel.*" (emphasis added) (App. 46a)

This provision applying to the marketing of motor vehicles and motor vehicle fuel lines 18, 19 and 20 was deleted from the Act as follows:

> Mr. President: The Committee on Commerce respectfully report that they have had under consideration Senate Bill No. 210
>
> And return the same with the recommendation that said bill be amended as follows:
>
> On page 2, line 17 of the printed bill strike everything after the period, and strike all of lines 18, 19 and 20.

* See original Sen. Bill 210, 1974, 49th Sess. on file in S.D. Legislature.

** Lines as numbered in original bill.

> On page 8 of the printed bill between lines 13 and 14 insert the following: "(5) All franchisors who have a net worth of $10,000,000.00 or more and have had at least twenty-five franchises in operation in the United States for the last twenty-five years."
>
> And that as so amended said bill do pass.
>
> 1974 South Dakota Senate Journal at 544, App. 50a.

Senate Bill No. 210 was subsequently enacted into law as SDCL 37-5A as follows:

> "Franchise does not include any business which is operated under a lease on the premises of the lessor as long as such business is incidental to the business conducted by the lessor on such premises, including, without limitation, leased departments and concessions." (App. 56a)

The district court herein did not rely upon the South Dakota Franchise Act, Judge Nichol relied solely upon *Mobil Oil Corporation v. Rubenfeld, supra,* a 1972 New York State Court Appellate case which had been reversed in 1975.

> The Court: The objection is overruled. I might also add for the record that the instruction is taken from the case of *Mobil Oil Corporation v. Rubenfeld,* 339 N.Y.S.2d 623, a 1972 New York State Court Appellate case (Tr. 837).

The panel majority's statement that the South Dakota Franchise Act applies to the marketing of motor fuel and was a codification of the common law is clearly erroneous.*

* As Judge Bright stated in his dissent (App. 30a):

> "In the passage relied on by the majority, plaintiff's counsel was attempting to explain the New Jersey Superior Court's interpretation of that state's franchise

(Footnote continued on following page)

No court has ever held that the existence of a franchise relationship places the franchisor in the position of a fiduciary. In *Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co.*, 316 F. Supp. 435 (D.C. Mo. 1970), Judge Meridith in disposing of a similar claim that the termination of a distributor breached a fiduciary relationship stated as follows at page 445:

> ". . . defendant, Sherman Industrial alleges that the plaintiff breached its fiduciary duty toward that defendant. The Court has been cited no authority that indicates the existence of a franchisor-franchisee relationship places the franchisor in the position of a fiduciary. The record shows no special circumstances that would require this Court to impose a fiduciary relationship where it does not normally exist. It is the opinion of the Court that the defendant has not proven the existence of a fiduciary relationship . . ."

In any event, federal courts, when faced with a non-federal question, are required by the Erie Doctrine (*Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)) to apply the substantive law of the state in which they sit, regardless of whether they approve or disapprove of the rules established thereby. The Rules of Decision Act (28 U.S.C. 1652) is explicit on that point and provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply." 28 U.S.C. 1652

footnote continued

statute in *Shell Oil Co. v. Marinello*, . . . Judge Nichol interrupted to observe, "In other words, they were codifying the common law." Plaintiff's counsel replied, "That's exactly right." Judge Nichol then said, "Just as *maybe* South Dakota did when it adopted the Franchise Act, was codifying what was really the law in South Dakota anyway." (Emphasis added.) Plaintiff's counsel responded, "That's exactly what the New Jersey Court said." (App. 30a, fn.2)

It is not the province of a federal court—district or appellate—to look beyond the designated state, here the State of South Dakota, in an attempt to find an excuse for not applying the substantive law of South Dakota.

The majority's statement (App. 17a) that:

> "In any event, when the instructions on breach of fiduciary duty are considered as a whole, error, if any was harmless. See note 7 *supra*."

is based upon the following instruction set forth in note 7 given over Amoco's objection, that misstated the law of South Dakota where, as here, there is a valid written agreement between the parties:

> You are instructed that under the laws of the State of South Dakota that the terms of the contract may be implied if manifested by the conduct of the parties. Therefore, if you should find that under all the facts and circumstances presented, that the defendant's conduct implied that it would supply plaintiff with sufficient quantities of gasoline and other petroleum products to enable the plaintiff to maintain a 24-hour operation, then you may also find that the defendant's failure to fulfill the implied condition would excuse the plaintiff's failure to maintain a 24-hour operation of the station. (App. 11a).

The Supreme Court of South Dakota has specifically stated that that is not the law. In *Thurston v. Cedric Sanders Co.*, 80 S.D. 426, 428, 125 N.W.2d 496, 498 (1963), an action brought by the plaintiff to recover from the defendant upon an implied contract, the Supreme Court of South Dakota in dismissing such action stated:

> "There is no question but what, where there is a valid express contract existing between parties in relation to a transaction, fully fixing the rights of each, there is no room for an implied promise or suit or quantum meruit. [cite omitted] The rights of the parties are controlled by the contract, ...

Amoco requested the court to instruct the jury regarding the legal requirement that Amoco allocate its supply of gasoline and Arnott's acceptance of such allocated amount since he had made no objection thereto within the prescribed thirty (30) day period. As a matter of South Dakota law SDCL 57-7-37 to 42 Arnott was estopped from claiming excuse or inadequate supply (Tr. 828). The refusal of the court to give Amoco's Instruction No. 8, was extremely prejudicial and deprived Amoco of a substantial defense. Amoco was not "merely repeating the argument that the evidence offered did not create a submissible case" as the majority states (App. 25a). The applicability of these sections of the South Dakota law, which are §§ 2.615 and 616 of the Uniform Commercial Code, to the case at bar is best illustrated by the Washington Court of Appeals decision in *American Oil Co. v. Columbia Oil Co.*, 567 P.2d 637 (1977) wherein the court at page 639 stated as follows:

> This section of the statute does not apply to the termination of a contract by either the buyer or seller; rather, it applies to a situation where it becomes impossible or impracticable for a seller to perform during the existence of a contract. RCW 62A2-615 is meant to be asserted as a defense by a seller who is unable to deliver due to unforeseen circumstances and as a consequence has been sued by the buyer for breach of contract. In fact, the statute is located in the Breach, Repudiation, and Excuse section of the UCC and creates a defense rather than a substantive right. Uniform Commercial Code, *supra* at 335 . . .

> If Columbia was dissatisfied with American's allocation prior to American's termination of the contract, it failed to give timely notice of that fact as required by RCW 62A.2-616.

III.

THE MAJORITY'S DECISION ESTABLISHES AN ERRONEOUS STANDARD OF PROOF UNDER SECTION 1 OF THE SHERMAN ACT AND ELIMINATES THE COMBINATION AND CONSPIRACY REQUIREMENT THEREFROM.

The record evidence in this case reflects that Amoco had some ninety (90) stations in the Sioux Falls marketing area (Tr. 532) and that such dealers were free to post any price they so desired. Furthermore, when dealers posted the suggested price they did so because of their own individual decisions and in light of local competitive conditions. This fact alone establishes that dealers have retained their pricing discretion. There was no evidence that Amoco had threatened to terminate any leases if the lessees did not follow a set pricing policy, and there was no evidence that such had ever been done. There is no evidence of any coercion of Amoco dealers throughout the relevant market.

As stated by Judge Bright (App. 33a):

> "First, the evidence provides no support for the notion that Arnott unwillingly complied with Amoco's 'price directives.' 'Directives' cannot mean merely Amoco's suggested price: such suggestions, standing alone, were clearly permissible. *Susser v. Carvel Corporation*, 332 F.2d 505, 510 (2d Cir.), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). The majority must be referring more particularly to the conversations over coffee that Arnott had with Amoco representatives when he deviated from the suggested prices. But there is no evidence that Ar-

nott changed his prices as a result of these conversations, or that he thereafter hewed more closely to Amoco's suggested prices. The cited incident with Dick Lucas likewise resulted in no change; Arnott continued to price independently (*i.e.*, generally higher than Amoco's suggested prices) throughout the period of his lease. Hence, in this case no combination existed and no actual fixing of prices occurred. *Cf. Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967) (affirming dismissal of an antitrust complaint on similar facts).

"The panel's second theory is also inapplicable to the facts of this case. Having reviewed the record, I find no substantial evidence of a combination between Amoco and its other dealers. The record simply does not support the majority's characterization of the dealer's behavior as 'acquies[cence] in [an] enforced pricing policy.' *Ante*, slip op. at 22. In contrast to the fragments of Mrs. Pascoe's testimony quoted by the majority, *ante* slip op. at 20, nine witnesses who were past or present Amoco lessees (including Greg White) testified that retail gas prices were only suggested by Amoco, that the dealers possessed final authority to set prices, and that this authority was frequently exercised independently. Moreover, not one testified that his lease had been threatened or terminated in retaliation for independence in pricing. *Cf. Umphres v. Shell Oil Company*, 512 F.2d 420, 422 (5th Cir.), *cert. denied*, 423 U.S. 929 (1975) (holding comparable evidence of vertical price fixing to be clearly insubstantial)."

The record evidence disproving the claim of retail price fixing is overwhelming. Arnott testified that he did not follow the suggested retail price; that he kept his price generally higher (Tr. 47); and that on only one (1) occasion, did he have any pricing problem, i.e., when Dick Lucas drove up to buy gas, said the price was too high and drove off, but he, Arnott, did not change the price (Tr. 47, 144).

Jim Breen, Assistant Manager of Plaintiff's station, called by the Plaintiff, testified that Amoco only suggested the price (Tr. 336); that he knew of no problems with Amoco about pricing (Tr. 335); that Dick Lucas was one of their best gas customers (Tr. 335); that there was only one problem, Dick Lucas not buying gas one afternoon, saying the price was too high and driving off and that the price was not changed at that time (Tr. 335-35); and that Arnott was free to price higher anytime he wanted to (Tr. 337).

Donald Christensen, Manager of Plaintiff's station, called by the Plaintiff testified that Arnott did not follow the suggested price but deviated from it (Tr. 345, 351); that Arnott was free to set his own prices and he did (Tr. 351-352).

Greg White, a former Amoco lessee who voluntarily cancelled his lease, was called by Plaintiff and stated the only time he was threatened with cancellation was over a car wash (Tr. 387) not over pricing; that he priced independently and he would watch his traffic and volume as his price depended on the market around him and the first customer that said gas was cheaper down the street he'd lower his prices (Tr. 386).

Mrs. Pasco, widow of an Ex-Amoco lessee, called by Plaintiff testified that his lease was renewed (Tr. 362-3); he was not threatened with cancellation (Tr. 376); he would deviate from the suggested retail price (Tr. 367); and that she sold the station because of her husband's heart attack and health (Tr. 371, 379).

The Amoco dealers who testified, uniformly agreed that they were free at all times to determine their own

retail prices. Gary Gould, an Amoco dealer for five years, testified that he was never threatened with loss of his lease (Tr. 547); that there has never been any attempt to regulate the price of the gasoline he sold other than Government controls (Tr. 550); and that if he violated his lease, he would assume he would be cancelled (Tr. 551). Charles Klusak, an Amoco dealer for 31 years, testified that he did not follow the suggested retail price (Tr. 556); and that he carried and displayed competitive TBA (Tr. 557). Wilbur Meelberg testified that he was never coerced and that he was never threatened with termination of his lease (Tr. 562-3). Bob Wrage testified that he went along with some of the programs (Tr. 566); that there never was any threats or coercion used to make him go along with such programs (Tr. 566); and that he was free to set his own prices (Tr. 566). Gary Parks testified that he was never threatened with termination of his lease (Tr. 573); that there never was any attempt on behalf of Standard Oil to fix his prices (Tr. 573). Lance Carson testified that his lease was never threatened (Tr. 580); that he carried and displayed non-Standard products and no one ever complained about that to him (Tr. 580); and that no attempts had been made by Amoco to set his prices (Tr. 581).

Lloyd Carson testified as follows:

> Q. Was there ever any attempt by Standard Oil to regulate the price of your gas?
> A. Not on the retail side of it, no. They'd take and tell me the price I pay for my gasoline—
> Q. Certainly, we realize that. Did they tell you what to charge?
> A. —what I had to pay for the price of gasoline?
> Q. But they would not tell you what to charge?
> A. What I had to sell for, no. (Tr. 595.)
> Q. Were you free to set your own retail price?
> A. Yes, sir. (Tr. 599.)

Donna Carson testified that there were no threats, no coercion (Tr. 587-8); and that there were no attempts by Standard Oil to set their prices (Tr. 581). George Little testified that he was free to set the price of his gasoline as he saw fit (Tr. 603). He stated:

> Q. Has that ever caused any problems with the Standard Oil people?
> A. No.
> Q. Did Standard Oil ever dictate the price of gasoline to the consumer, to the motoring public, to you?
> A. Not to my knowledge.
> Q. Were you free to set the price as you saw fit?
> A. Yes, sir. (Tr. 603.)*

A. The Denial Of Amoco's Instructions That (1) A Corporation Could Not Conspire With Its Officers, Employees, Or Agents And That (2) It Was Lawful And Not Coercion For Amoco's Salesman To Engage In Exposition, Argument, And Persuasion Resulted In A Misstatement Of The Law To Amoco's Prejudice.

To constitute a violation of Section 1 of the Sherman Act, there must be a contract, combination, or conspiracy. As stated by the Seventh Circuit in sustaining a directed verdict for the defendant in *Gordon v. Illinois Bell Telephone Company*, 330 F.2d 103 at 107 (7th Cir. 1964):

> "Moreover, there is nothing in the record to support a conclusion that defendants' acts were pursuant to any agreement, combination, or conspiracy

* Amoco Lessees also testified uniformly that they were free at all times to purchase, sell, and to openly display any and all competitive brands of motor oil and TBA (tires, batteries, and accessories) and were free to accept or reject any promotional programs (Gould, Tr. 546-48; Klusak, Tr. 555, 557-58; Meelberg, Tr. 561-62; Wrage, Tr. 566-67; Parks, Tr. 572-76; Lance Carson, Tr. 579-81; D. Carson, Tr. 587-89; Lloyd Carson, Tr. 593-95; Little, Tr. 601-03).

> between any of the defendants and any third party not employed by the telephone company. It is undisputed that the individual defendants acted only on behalf of the company, the corporate defendant, and not on their own behalf. Thus, there was no proof of the 'combination' or 'conspiracy' element required under Section 1 of the Sherman Act. *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, (5th Cir., 200 F.2d 911). (Emphasis added.)

The combination, contract, or conspiracy in question must be between the defendant and some other independent entity. As a matter of law, a corporation cannot "agree" with its officers, its employees, its agents, or its unincorporated divisions. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir.), *cert. denied*, 396 U.S. 1062 (1969).

Amoco requested the court to instruct the jury that the defendant corporation could not conspire with its officers, employees, agents, or with its unincorporated divisions. The court, however, refused to so instruct the jury to Amoco's prejudice, depriving it of a substantial defense. In refusing defendant's request for such instruction the court stated: ". . . *while I think the word conspiracy was mentioned in the pleading, there was no evidence whatever on conspiracy and that is the reason why I have not given it* (Tr. 826). (Emphasis added.)

In *Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir. 1967), *cert. denied*, 389 U.S. 801 (1967), the Court of Appeals affirmed the trial court's dismissal of plaintiff's complaint and stated that a unilateral attempt by the defendant to coerce plaintiff into making a price-fixing agreement was not actionable:

> "The allegation that defendant pressured plaintiff to reduce his retail price at best amounts to a unilateral attempt to coerce plaintiff into making such

> an agreement. Therefore, the immediate question is whether this is actionable under Section 1 of the Sherman Act. I think not. If Congress intended to make attempts actionable under this section undoubtedly it would have done so expressly as it did in the very next section of the Act (15 U.S.C. § 2) dealing with monopolies. It certainly is not within our province to read into this section interstitially a proscription which Congress clearly did not intend." (375 F.2d at 275.)

The denial of Amoco's instruction that it was lawful and not coercion for Amoco's salesman to engage in exposition, argument, and persuasion resulted in a misstatement of the law to Amoco's prejudice. The Supreme Court has upheld the legality of a supplier's efforts to persuade and urge his customer to take a particular action and has distinguished this conduct from coercing his customers. *Ford Motor Co. v. U.S.*, 335 U.S. 303, 318 (1948). In defining the line between exposition, persuasion, and argument, all of which are legal and coercion which may be illegal, the Supreme Court specifically approved the following formulation:

> "In exposition, one may expound the merits of that which he has to sell. He may explain its nature, and by his exposition make a clear picture of what he has.
>
> "By persuasion, he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.
>
> "There is little difference, little advancement in future progress to argument. Persuasion means something softer than argument, perhaps, but one may argue with another the respective merits of his product and other products being offered to the person to whom he makes his offer. All of these are proper.

"He may not go beyond that, and use something that is within his power as a club to coerce the person to accept that which he has to offer." *Ford Motor Co. v. U.S.*, 335 U.S. 303, 318.

Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), makes it clear that a supplier may suggest retail prices to its dealers and use "persuasion" to get them to adopt the suggested prices. No violation is made out unless plaintiff can show that the supplier's conduct rose to the level of coercion sufficient to deprive the dealers of their free choice. Plaintiff Arnott made no such showing. Upon the same facts as exist in the case at bar, the Ninth Circuit in *Hanson v. Shell*, 541 F.2d 1352 (1976), affirmed the district court's grant of a directed verdict for defendant Shell.

Thus, it was legal for Amoco to suggest a resale price of gasoline to dealers. Similarly, it was lawful for Amoco's sales personnel to expound the advantages of purchasing TBA from Amoco and to attempt to persuade dealers that Amoco's sales programs were beneficial to the dealer. Amoco requested the court to instruct the jury herein to that effect, i.e., that exposition, persuasion, and argument were legal. The court, however, refused to so instruct the jury to Amoco's prejudice (Tr. 831).

B. The Lease Was Terminated For Legitimate Business Reasons.

There was no causal relationship between the alleged price-fixing activities and termination of the lease. Arnott was granted thirty days to cure his breach of the lease and to begin operating 24 hours a day. The notice provided *inter alia*, as follows:

"You have been violating the conditions of said paragraph 2 in that you have substantially curtailed your hours of operation. Paragraph 9(a) of the lease gives our Company the right to cancel . . . . You may, therefore, consider this letter written notice of our intent to cancel your lease effective September 5, 1973, unless the default above-stated is completed remedied and we are notified thereof prior to said date or in lieu thereof, you have made satisfactory arrangements with Mr. Clint Bucklin." (Tr. 163-4).

Instead of curing such default, lessee by his attorney made the following counteroffer:*

"Please be advised that Mr. Arnott is ready, willing, and able to perform all lease arrangements, including 24-hour operation, upon the assurance of the American Oil Company that it will supply him with all the gasoline and other petroleum products that he can sell." (Tr. 466-7.)

Arnott further waived the thirty (30) day period, i.e., to September 5, he was granted to correct the default, and vacated the station on August 6, 1973.

In contrast to the majority's statement (App. 21a), the jury could *not* "infer that Arnott's failure to follow Amoco's pricing directives was the proximate cause of the termination of his lease" in that at the time of such termination, *all prices, retail and wholesale, were frozen and had been frozen by the U.S. Government since June 13, 1973 and could not be moved up or down.* It is

* This was a specious offer, Arnott knew Amoco was under the U.S. Government's Allocation Program. (Tr. 87-8.) As Dick Lucas testified:

Q. Were you able to comply with that request?
A. We were not.
Q. Why?
A. We were under a voluntary allocation program as requested by the U.S. Government. (Tr. 492.)

undisputed that the United States Government in May 1973 instituted a plan to allocate gasoline and other petroleum products. It is further undisputed that the United States Government froze the prices of all petroleum products, including that of gasoline on June 13, 1973, and that such price freeze of gasoline was in existence at the time Arnott's lease was cancelled (Tr. 791).

Giving Arnott notice of termination on August 6, 1973, for failure to operate 24 hours coupled with a grant of 30 days to cure such breach, cannot by any stretch of the imagination constitute termination for failure to fix prices at a time when all prices were frozen and had been frozen for months, i.e., since June 13, and by law prices could not be moved up or down.

IV.

IT WAS IMPROPER FOR THE PANEL TO FIND THAT AMOCO MISREPRESENTED THE TERM OF THE LEASE WHEN THAT WAS NOT AN ISSUE PRESENTED TO OR CONSIDERED BY THE TRIAL COURT.

The only "misrepresentations" that were at issue before the trial court, were the alleged misrepresentations concerning: (1) Defendant's promotions; (2) Promotional merchandise; (3) Equipment; (4) Products; and (5) Profitability of the installation of a car wash.

The "misrepresentations" at issue were set forth by the Plaintiff Arnott in his Amended Complaint § VIII as follows:

> "That during the time period of the aforementioned dealer lease agreement, the defendant, through its agents and employees, made knowingly false, deceitful and fraudulent misrepresentations to the Plaintiff concerning [1] Defendant's promotions, [2] promotional merchandise, [3] equipment, [4] products and [5] the profitability of the installation of a car wash. That Plaintiff justifiably relied upon said misrepresentations and false statements and thereby incurred unnecessary expenses and sustained lost profits."

The jury was instructed by the court as to Arnott's claim of misrepresentation as follows:

> "Under Count I of his Complaint, the plaintiff brings suit against the defendant for actual and punitive damages on account of certain representations made by agents and employees of the defendant to the plaintiff which the plaintiff claims were false and fraudulent. The representations were both oral statements made by agents and employees of the defendant and written statements contained in the defendant's Statement of Policy [Exhibit 1]. The representations relate to the service station leased by the defendant to the plaintiff and to the operation of that service station." (Tr. 772-3)

> "The plaintiff claims that defendant represented that . . . [1] plaintiff would be an independent businessman . . . [2] no company representative would bring any pressure to bear on the plaintiff if he chose to handle competitive brands of motor oils . . . [3] with respect to tires, batteries, and accessories, that plaintiff would have complete freedom to buy these products from whomever and in whatever quantities he chose . . . [4] the plaintiff would have the absolute right to set his own resale prices on gasoline and all Standard Oil products . . . [5] the plaintiff would not be pressured into participating in advertising, sales promotions or merchandising programs . . . [and] that defendant misrepresented [6] the benefits to be received by the plaintiff for the installation of a car wash." (Tr. 773-4)

> "You are instructed that a claimed representation to constitute a cause of action for fraud and deceit

must be of a material fact, that it must be false and must have been known by the party making the same to be false at the time it was made and must have been made with the intent to deceive and the person to whom it was made must have acted in reliance thereon and been thereby induced to change his position to his pecuniary damage."

"In this case, if you find from the evidence that the defendant's agent or agents represented that Standard Oil would follow the policies of the company as outlined in Exhibit 1, AMOCO's policy statement, and the lease, that such representations were false and known by the defendant's agent or agents to be false, or in reckless disregard of the truth, and that they were made with an intention to deceive the plaintiff, and if you further find that the plaintiff believed such representations and that he relied thereon, then your verdict should be for the plaintiff for such reasonable damages as he has sustained by reason of such claimed fraudulent representations." (Tr. 781-2)

The issue of misrepresentation of the term of the lease was improperly considered by the Appellate Court. There was no claim made by Arnott in his Complaint, Amended Complaint or during trial that Amoco misrepresented the term of the lease. It is axiomatic that issues, neither pleaded nor presented to the trial court, cannot be raised for the first time on appeal. The reason the panel allowed misrepresentation of the lease term to be raised for the first time on appeal was simply because there was no evidence submitted of any damages regarding fraud on the issues presented to the jury—the only evidence of damages being loss of future profits.

As stated by the United States Supreme Court in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); in reversing the decision of the Eighth Circuit, 508 F.2d 1211 (8th Cir. 1975):

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could offer in defense . . ., but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense . . . ." 428 U.S. 120

Arnott specifically testified that the automatic renewal provision of the lease was stricken out and initialed by him to limit the lease to one year only:

Q. The station that you had in Maple Grove, Iowa (sic), had an automatic extension, did it not?
A. I don't recall on that particular location.
Q. I'm sorry, I keep saying Iowa. It's Minnesota. That provision was stricken in the lease agreement involved here, was it not?
A. As I stated before, there was considerable difference between operating service stations in Minneapolis and operating service stations in South Dakota; Sioux Falls particularly.
Q. My question, Mr. Arnott, was that the automatic continuation period was stricken in this lease, was it not?
A. I believe so, yes.
Q. And did you initial that change?
A. Yes, I did.
Q. And the same would be true on the renewal of that lease?
A. Yes, I did.
Q. And you have read that portion over?
A. Yes. (Tr. 121-2)

V.

AMOCO'S ALLEGED MISREPRESENTATIONS, AND PLAINTIFF'S ALLEGED ACTS IN RELIANCE THEREON, DID NOT PROXIMATELY CAUSE THE LOSS OF PLAINTIFF'S STATION OR ANY OTHER LOSS.

An essential legal ingredient of the cause of action in fraud and deceit is actual injury proximately caused by reliance on misrepresentations. Without it, there can be no recovery. That ingredient of liability is completely lacking here. The only thing plaintiff claimed to have done in reliance on "misrepresentations" was to enter into a lease with defendant. The lease, plaintiff entered into was desired by and highly advantageous to plaintiff. It was not a detriment and there is no claim by plaintiff that it was. Furthermore, there is no evidence that, by reason of the lease, plaintiff was prevented from obtaining more attractive business opportunities. Entering into the lease, proximately caused no hurt, harm, or injury and no loss or damage whatever to plaintiff, but on the contrary, a great and highly desired benefit to him. Amoco's alleged misrepresentations and Arnott's act in alleged reliance thereon did not proximately cause him injury or one cent of damages.

The jury* erroneously awarded plaintiff damages not for his acts in reliance, i.e., entering into a lease on February 17, 1972, but for the later loss on August 6, 1973, of a second lease which was entered into on December 8, 1972, and which was amended on April 12, 1973.

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* What the jury actually did cannot be determined from the verdict.

A. Plaintiff Did Not Introduce Sufficient Evidence Either Of Fact Or Amount Of Damage To Submit Any Issues To The Jury.

The jury was permitted to include in its award to plaintiff the present value of future adjusted gross income he anticipated, but for breach of fiduciary duty, false representations, nonpayment of a debt, and violation of antitrust laws. This was a basic error, in that, such adjusted gross income was (1) not a loss proximately caused by any acts of reliance, and (2) a speculative loss incapable of measurement by any sufficient proof adduced by plaintiff. The plaintiff submitted no proper evidence from which the jury could award any damages to him caused by breach of fiduciary duty or fraudulent representations.

The plaintiff's "expert's" projections of "lost income" were purely speculative and without evidentiary support. Such "expert" calculated the amount of plaintiff's damages by averaging his adjusted gross income for the years 1972 and 1973. In the 1972 and 1973 computation he included income from sources other than from the service station in issue. Plaintiff's "expert" then multiplied this 1972-1973 gross income average by plaintiff's work life expectancy of some 18.9 years in spite of the fact that plaintiff had a nonrenewable one (1) year lease that pursuant to its terms would expire on February 18, 1974. This is the type of speculation condemned in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

It is error to apply such methodology to situations as in the case at bar where the plaintiff is fully able to work and has options for alternative sources of income after termination of the business in question. The proper

measurement of damages is the going concern value of a destroyed business. *Standard Oil Co. v. Moore*, 251 F.2d 188, 220-221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1957) and *Simpson v. Union Oil Company*, 411 F.2d 897, reaffirming *Moore* at 909-910 (9th Cir. 1969), *rev. on other grounds*, 396 U.S. 13 (1969).

In *Standard Oil Co. v. Moore, supra*, the evidence was held sufficient to establish a Sherman Act violation by an agreement, combination, or conspiracy of several oil companies. However, a judgment for the dealer was reversed because of the reception of inadmissible evidence. With respect to the admissibility of certain evidence on the question of damages, the court said that the dealer's only loss was the "going concern" or "goodwill" value of his business; that the dealer retained his life expectancy business acumen after losing his business, and that neither the value of the business to him nor the profit potential of the business beyond that transferable to a purchaser had any effect on the market value of the business.

In *Simpson v. Union Oil Co., supra*, one issue was the measure of damages for Union Oil's unlawful refusal to renew a service station lease because of the plaintiff-lessee's sale of gasoline at below the price fixed by the oil company. The lessee's evidence was that he might have earned $10,500 per year at the service station, over his life expectancy of 24 years, which had a discounted value of $160,000. The jury returned a verdict for the lessee of $160,000, but the trial court granted a new trial on the ground that a $160,000 verdict for refusal to renew a one-year lease was "monstrous" and against the weight of the evidence. In affirming, the Court of Appeals said that this method of calculating damages was the same as if the lessee had been personally per-

manently disabled; and that it falsely assumed the lessee's inability to earn any other money for the rest of his life. Rather, the court said, the elements and measure of damages were (1) lost profits during the lessee's operation of the station because of the oil company's illegal restraints, and (2) the going concern value or goodwill of the operating business, or the fair market value of the business.

Plaintiff's "expert" when making his projections of future damages admittedly did not take into account: (1) the term of the lease or the fact that plaintiff could terminate on thirty days' notice (Tr. 290-1); (2) plaintiff's prior work history which reflected no lifetime commitment to operating a service station* (Tr. 291); (3) the fact that plaintiff worked 12 hours a day, 6 days a week in operating the station—a period of time comparable to holding two jobs* (Tr. 151). Plaintiff's "expert" further admitted that the numbers he used in making the future damage loss projection were not accurate:

> Q. Okay. And would you mark down the adjusted gross income Mr. Arnott derived in 1972, being the first year that he was in the station?
>
> A. Okay. That's $20,231, and that kind of roughs in right there (indicating).
>
> Q. That's for the 11 months of the year that he was in the station?

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* Plaintiff voluntarily cancelled his lease of the Wessington Springs and later the Huron, South Dakota service stations. Plaintiff took a job with the Equitable Life Insurance Co., quit that and later went to work for the Sun Electric Company from 1966 through 1969 (Tr. 122).

** If Dr. Johnson had considered such in his calculations there would have been no loss. The "loss" was caused by plaintiff reducing his working hours, i.e., working an 8-hour, 5-day, 40-hour week, rather than a 6-day, 12-hour, 72-hour week.

A. Ten and a half, that's right, although—well, it's not quite right. He had the station for ten and a half months during that year, but the figure that I show here is the total income for 1972, so it's not just station income. It's total income during that time period.

Q. And then the adjusted gross income in 1973?

A. Was $21,258, and that, once again, is total income during that time period, not just station income.

Q. All right. Based on or including eight months of station operation?

A. Well, about seven (Tr. 257-58).

Q. Now, would you explain to the jury, please, what method you've used to use this data computed into an economic loss?

A. Okay, What I do to try to determine what the total losses of Mr. Arnott would be say out into the future is this: I take the data that I indicated I collected a little earlier in my testimony, and put this into a standard formula, a present value formula, ...

Roughly, the procedure goes something like this: I calculated the income in 1972 and 1973. 1972 and 1973, you remember, were those years during which he had the station. The other years, that is, 1971, 1974, '75, '76 and '77, were years in which he did not have the Sioux Falls station, so I averaged the income for those years, and then got a difference, say, between the two.

Then having done that, I take the difference and use the formula to get the present value of the loss that he would have sustained every year (Tr. 260).

Such calculations in this posture are pure speculation. The damage exhibits and Dr. Johnson's testimony were improperly admitted into evidence.

B. Dr. Johnson Lacked Both The Qualifications And Preparation To Testify As An Expert Witness.

Dr. Johnson conceded on cross-examination that he had no knowledge of service station operations and that service station operations were not within his field of expertise.

Q. Dr. Johnson, did you examine the leases in question?

A. No, I did not.

Q. Do you understand that they were for a term of one year, from the testimony that was in Court here?

A. From what I've heard, yes, the leases were for one year.

Q. You didn't take that into consideration, did you?

A. Well, I don't know if I can quite answer that—

Q. Can you show me on here on your calculations where you took that lease into consideration?

A. No.

Q. And you didn't take into consideration the fact that Mr. Arnott had a right to terminate the lease, did you?

A. Well, in a sense, no but there's—okay.*

Q. Now, you didn't take into consideration his past income prior to 1971?

A. I didn't have any returns for that, but you're right, no I didn't (Tr. 271-72).

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* The lease in the instant case would have terminated, i.e., expired pursuant to its terms on February 18, 1974. It was for a one-year period only and there was no writing of any kind extending it. See SDCL 43-32-5 which provides:

"Lease of real property for more than one year—Written contract necessary. No agreement for the leasing of real property or an interest therein for a longer period than one year is valid unless the same, or some note or memorandum thereof, be in writing, signed by the lessor or his agent thereunto authorized in writing."

Q. Are you familiar with the gasoline service station business other than from what you learned in this case?

A. Well, not intimately. I purchase, you know, a certain amount of gasoline, and I have taught a little bit; in the Industrial Organization class, we have looked at the energy and oil industry some.

Q. Well, I'm talking specifically about the operation of a service station day by day, year by year.

A. No; no.

Q. All right. And you don't consider yourself an expert in that field, then?

A. No.

Q. And you've never dealt with a service station or contractual problems such as this before?

A. That's right (Tr. 292-293).

There can only be one conclusion as to Dr. Johnson's "evidence." It should have been excluded as incompetent and nonprobative and a verdict directed for defendant for lack of any evidence on damages. *Herman Schwabe, Inc. v. U.S. Shoe Machinery Co.*, 297 F.2d 906, 912-913 (2nd Cir. 1962) and cases there cited.

Dr. Johnson when making his projections of future damages admittedly did not take into account the term of the lease or the fact that plaintiff could terminate on thirty days' notice without cause (Tr. 292).

The court in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), 500 F.2d 659 (1974), did not approve the method used in the instant case to compute damages. As stated by the court in *Lehrman*, 500 F.2d at 668, in regards to Lehrman's expert:

> "His expert accountant relying on the history of the station and testimony from witnesses prepared a schedule representing sales volumes of fifteen, twenty and thirty thousand gallons per month . . . . For each volume level, profits were computed by using margins of three, four and five cents per gallon, and the margin assumptions were adequately based on the station's past experience . . . a schedule of other expenses was prepared in order to forecast the potential for net profit. Rather than relying exclusively on Lehrman's past expenses the expert accountant correlated his station expense data with that of three others with which the expert was familiar in order to establish average monthly expense data for service stations." (Emphasis added)

Dr. Johnson did no study like the expert in *Lehrman.* In any event, Dr. Johnson is better qualified than anyone else to know whether he is in fact qualified to testify as an expert witness in the instant case. Dr. Johnson admitted that he knew nothing about service station leases or the operation of service stations. Dr. Johnson further stated that he was not an expert in such areas (Tr. 292-3). Dr. Johnson thus, by his own words, was not competent to testify. His testimony was clearly inadmissible.

VI.

THE DAMAGES HEREIN ARE DUPLICATIVE.

In response to the fact that Arnott cannot sell his business and also recover future profits from that business, the panel simply makes the bald assertion that the sale was not at arms length. There is no evidence in the record to that effect. The evidence is directly to the contrary. Arnott sold his business pursuant to the provisions of the Bulk Sales Act of South Dakota, SDCL 57-24, (Tr. 139; Exhibits D, E and F).

A "Notice to Creditors" was published pursuant to SDCL 57-24-18 of such Act, notifying creditors of Arnott of such sale and that documents pertaining to such sale

had been filed and were open for inspection at the Register of Deeds Office, Minnehaha County Courthouse (Tr. 139; Exhibit D). A "Bulk Sales List of Creditors" was given under oath by Arnott in compliance with SDCL 57-24-16 (Tr. 139; Exhibit E).

Contrary to the panel's statement, Arnott was not "involuntarily thrown out of his station" but voluntarily waived the 30-day period to September 5, he was granted to cure his breach of the lease or to vacate the station and voluntarily vacated the station on August 6, 1973 (Tr. 163-4; Exhibit 29). There is no evidence of a forced sale and *there is no evidence* in the record *that Arnott could have sold his business for a higher price than the $30,638.05 he received from Mr. Sadler* (Exhibit D). That this was a fair price however is borne out by Arnott's testimony:

> A. In February of '72, the initial investment when I went into the station was $27,722.14 (Tr. 116).

See *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978), where the Fifth Circuit in ruling that "the trial court erred in denying the [defendant's] motion for directed verdict and so allowing [plaintiff's] goodwill testimony to go to the jury" stated:

> "When Kestenbaum sold his business, [1] *he recovered the value of his capital investment*, and [2] *he took with him the worth of his own labor.* Strict adherence to the indicated elements of goodwill proof was necessary to ensure he did not count a return from those sources as part of the goodwill he lost by selling the business, and so effect a *double* recovery." (Emphasis added)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE R. GLOVER
200 East Randolph Drive
Suite 2106
Chicago, Illinois 60601
(312) 856-7938

TIMOTHY J. NIMICK
WOODS, FULLER, SHULTZ & SMITH
310 South First Avenue
Sioux Falls, South Dakota 57102

Attorneys for Petitioner